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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERBERT ROSENGARTEN, ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. 1a-11a) is reported at 181 F. Supp. 275.

JURISDICTION

The judgment of the Court of Claims was entered on March 2, 1960. (Pet. 1a.) A motion for rehearing was overruled on May 4, 1960. (Pet. 31a.) The petition for a writ of certiorari was filed on July 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the evidence warranted the conclusion reached by the court below that taxpayers had not in fact filed certain claims for refund within the time prescribed by the applicable statute of limitations.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *

(2) [As amended by Sec. 169, Revenue Act of 1942, c. 619, 56 Stat. 798] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim

was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceeding the filing of the claim.

* * * *

(26 U.S.C. 1952 ed., Sec. 322.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law, in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7422)

STATEMENT

During 1944 and 1945, the taxpayers were members of a family partnership, the Herbert Manufacturing Company. Each filed a federal income tax return for 1945 and proceeded to pay the amount of tax reported. Subsequently, deficiencies in income tax were assessed against the taxpayers for 1944

and 1945, and they paid these deficiencies between 1948 and 1951. (Pet. 1a-2a, 12a, 14a-15a, 17a.)

On February 7, 1950, each of the taxpayers filed a claim for refund for 1944 on the ground that recent decisions and rulings indicated that the deficiency for that year, rested upon the view that certain persons were not members of the family partnership, had been erroneously assessed. (Pet. 2a, 13a, 15a, 17a.) On March 3, 1950, claims for refunds for 1944 and 1945 were filed on similar grounds on behalf of a brother and partner of the taxpayers, Walter Rosengarten, who had died on February 10, 1946. (Pet. 2a, 17a.)

In June, 1953, the taxpayers' returns for 1944 and 1945 were re-examined by a revenue agent and, on the basis of a reconsideration of the family partnership question, overassessments were recommended for 1944 and 1945. The taxpayers' claims for 1944 and the claims of Walter Rosengarten for 1944 and 1945 were allowed and appropriate refund payments were made. Refund for 1945 was denied on the ground that neither taxpayer had filed a timely refund claim as required by Section 322(b)(1) of the 1939 Code. (Pet. 2a-3a, 13a, 15a-16a, 17a-19a.)

On July 2, 1953, and December 27, 1954, respectively, each taxpayer filed a claim and an amended claim for refund for 1945. These claims were disallowed. (Pet. 2a-3a, 13a-14a, 16a.)[1]

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[1] The Court of Claims held (Pet. 9a) that the taxpayers should recover the amounts paid in 1951, within the two year statutory period of their 1953 claims, despite their refusal to agree to offset for deficiencies, relating to these amounts, due by their family members of the partnership.

The facts found with respect to the failure of the taxpayers to file timely refund claims for 1945 are as follows:

Refund claims for the taxpayers for 1944 and 1945 were prepared for them by an accounting firm and were hand-carried by Samuel J. Rossman, an employee of that firm, to their place of business. Testifying some eight years and nine months after the events in question, Mr. Rossman stated that he knew in general terms that he was presenting original and duplicate claims for 1944 and 1945 to each taxpayer to be signed. He testified that the documents were signed and notarized and that two envelopes were prepared at his direction for mailing to the Collector of Internal Revenue. The taxpayers paid no further attention to the documents after signing them, but presumed that either Mr. Rossman or their secretary picked them up. Mr. Rossman's recollection was vague as to which of the documents were placed in which envelopes, the manner of affixing the stamps, and where and when he mailed the envelopes. The court found that he could not describe with particularity his handling of these documents and that the evidence relating to the mechanics of the alleged filing by mail of the 1945 claim did not give rise to a presumption of due delivery and receipt by the Government. (Pet. 3a, 5a-6a, 19a, 20a.)

There is no evidence of receipt by the Internal Revenue Service of the 1945 claims for refund. An exhaustive search of every known source disclosed no record in the office of the Internal Revenue Service

that the taxpayers had filed refund claims for 1945: The original and duplicate claims for refund filed by the taxpayers for 1944 were received in the mail room of the Collector of Internal Revenue, Third District, New York, on February 7, 1950, and various indexing and registry procedures were taken in the office of the Collector with respect to these claims. At the time it was virtually impossible for any incoming document to be discarded with its envelope because of the practice of viewing every opened envelope over a glass scope. It is possible for both of Mr. Rossman's envelopes to have reached the Collector's office containing only the taxpayer's 1944 claims. (Pet. 6a-7a, 20a-22a.)

The Court of Claims (two judges dissenting) held that the evidence does not establish that formal or informal refund claims for 1945 were filed by the taxpayers before July 2, 1953. Accordingly, judgment was entered for the taxpayers only for the amounts of tax paid in 1951. (Pet. 9a-10a.)

ARGUMENT

The trial court has determined from the evidence that the taxpayers did not file claims for refund of their respective income taxes for 1945 within the period limited by Section 322(b)(1) and (2) of the 1939 Code, *supra*, pp. 2-3. Consequently, pursuant to Section 7422 of the 1954 Code, *supra*, p. 3, their claims were barred by the applicable statute of limitations. The decision of the court below on the factual question with which this case is concerned

finds strong support in the evidence. The issue possesses no public importance and turns entirely on the particular factual circumstances. There is accordingly no occasion for review by this Court.

1. The court below correctly determined that the taxpayers had failed to furnish sufficient evidence concerning the alleged filing to support a presumption of due delivery and receipt. The taxpayers' evidence concerning the mechanics of the alleged mailing on February 7, 1950, consisted of the oral testimony of Samuel J. Rossman, the employee of the taxpayers' accounting firm who had been instructed to have the documents signed and mailed. Mr. Rossman's statements as to the placing of the claims in envelopes and the stamping and mailing of those envelopes was vague and indefinite. He testified that he had not examined the refund claims in detail (Tr. 48-50) and did not even look at the particular documents before placing them in envelopes (Tr. 53-54). In short, he did not know with any certainty what he put in the envelopes. He was not sure who had stamped the envelopes or exactly where or when they had been mailed. (Tr. 53.) Under such circumstances his personal recollection of acts which he was supposed to have performed some eight years and nine months earlier is of doubtful reliability. *Worden & Co.* v. *United States*, 22 F. Supp. 418 (C. Cls.).

The Government presented detailed evidence concerning the step-by-step treatment of incoming mail (particularly claims) in the office of the Collector of Internal Revenue, Third District, New York, dur-

ing 1950.[2] This evidence established that the loss of any claim for refund following receipt in that office was, if not impossible, at least an extremely unlikely eventuality. (Pet. 6a, 20-22a; Tr. 88-96, 104-105.)

The circumstances of this case distinguish it from those in which other taxpayers were able to offer clear and convincing evidence of the preparation and mailing of claims and the Government offered only the bare assertion that a Collector had no record of the receipt of the claims. Here, the taxpayers have presented indefinite and unreliable testimony of mailing, and the Government has established by affirmative proof the extreme unlikelihood of loss.

2. The court below correctly refused to accept the taxpayers' offer of proof, by testimony of a tax practitioner, that claims for refund for other taxpayers at other times had been mislaid or lost in the offices of the Collector for the Third District of New York and other districts. (Tr. 117-121.) The witness was not qualified to testify with regard to procedures within the office of the Collector. The evidence offered related to the filing of claims by different tax-

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[2] *Crude Oil Corp.* v. *Commissioner*, 161 F. 2d 809 (C.A. 10th); *Detroit Automotive P. Corp.* v. *Commissioner*, 203 F. 2d 785 (C.A. 6th); *Jones* v. *United States*, 226 F. 2d 24 (C.A. 9th); *Watson* v. *United States*, 92 F. Supp. 555 (W.D. Ta.). The three appellate decisions, *supra*, upon which the taxpayers rely were not concerned with the question whether in fact claims had been mailed but with the probative effect of the presumption arising from such mailing. See *Worden & Co.* v. *United States*, *supra*, for a finding upon evidence similar to that here presented that no claim actually was filed.

payers at various times under circumstances entirely irrelevant to the issue in this case.

3. The taxpayers have failed to establish that informal claims for refunds for 1945 were filed within the statutory period. Prior to July 2, 1953, the taxpayers filed no document containing any claim of any kind for refund for 1945.[1] The filing of their claims for 1944 and of their brother's claims for 1944 and 1945 cannot constitute a filing for these taxpayers for 1945. A contrary conclusion would amount to a holding that the Commissioner should make refunds to taxpayers where he can deduce, from examination of returns for other years and other taxpayers, that such refund claims might be justified. The revenue laws have long proceeded upon the explicit premise that the filing by the taxpayer of a timely claim is a prerequisite to the refund of taxes. Section 7422, Internal Revenue Code of 1954; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269; *Aplington* v. *United States*, 169 F. Supp. 815 (C. Cls.), certiorari denied, 361 U.S. 821.

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[1] Cf. *Newton* v. *United States*, 163 F. Supp. 611 (C. Cls.), relied upon by the taxpayers, where the taxpayer filed written protests concerning the years in question and held a conference with a representative of the Commissioner, who filed a memorandum of the taxpayer's position with respect to those years.